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# Towards the humanization of international law through the final order of the International Court of Justice in the South Africa v. Israel case. Acts of genocide, stopping fire or another possible solution

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# Towards the humanization of international law through the final order of the International Court of Justice in the South Africa v. Israel case. Acts of genocide, stopping fire or another possible solution

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**Abstract**: This work makes an in-depth analysis and investigation on the crime of genocide from the order of 26 January 2024 of the International Court of Justice (ICJ) regarding the South Africa v. Israel case. The points of thought are many and still open. Even if we have the quick report of 26 February 2024 without calling for a ceasefire the results are the same: continued casualties in the Gaza area. On the one hand, past jurisprudence in similar situations allows us to carry out

comparative investigations. On the other hand, the non-ceasefire and the continuous, especially political, work on Israel's side allows us to discuss and make various statements without, therefore, arriving at points of consolidation. We also see the role of the Court itself in not resolving in a definitive way the dispute as well as not to take an exact position on whether or not acts of genocide were committed. And the question also remains unanswered as to whether or not every time an outbreak of war breaks out the ICJ should take a stand to stop any illicit act to save human lives?

**Keywords**: ICJ; ILC; Genocide Convention; provisional measures; Gaza Strip; orders of the ICJ; Final Report; humanitarian law; international law; crimes of genocide; war crimes; *jus cogens*; *erga omnes*; international responsibility; international torts.

## Introduction

For once again the crime of genocide is protagonist on the international stage through the proceedings of South Africa v. Israel for violating the genocide convention of 1948 against Palestinians in Gaza and Israeli military operations in the strip.

With the proceedings initiated at the International Court of Justice (ICJ)[1] on 26 January 2024[2] the relevant order was issued which obliged Israel to respect the provisional measures as a consequence of the continuing and final conflict in Gaza, calling to the table the international responsibility of states and violations of obligations of the state towards the international community as a whole, i.e. *erga omnes* obligations as well as towards groups of states that will have to protect human rights.

This is a logic and trend of global international law that it was also seen in the past from the ICJ in application of the

1Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel) - Colombia files a declaration of intervention in the proceedings under Article 63 of the Statute of 5 April 2024.

2https://www.icj-cij.org/node/203447. Accessed on 16.06.2025.

Convention on the Crime of Genocide, in Gambia v. Myanmar case of November 2019; the Application of the Convention against Torture, in the Canada and the Netherlands v. Syrian Arab Republic case of June 2023[3]; Application of the Convention on the Crime of Genocide in the Gaza Strip, South Africa v. Israel, case of December 2023.[4]

The Republic of Nicaragua institutes proceedings against the Federal Republic of Germany and requests the Court to indicate provisional measures in March 2024.[5] All these initiated proceedings have had as their basis in comunis obligations *erga omnes* and *erga omnnes partes* which are promoted by states which have not undergone damages, i.e. injured state based on Art. 42 of the International Law Commission (ILC) Draft Articles on the Responsibility of States for Internationally Wrongful Acts 2001 (Liakopoulos, 2020b).

3https://www.icj-cij.org/case/188. Accessed on 16.06.2025.

4https://www.icj-cij.org/case/192. Accessed on 16.06.2025.

5https://www.icj-cij.org/node/203822. Accessed on 16.06.2025.

They also included states other than the injured state that had the relative interest of invoking the responsibility of states as presumed perpetrators for offenses committed according to Art. 48 of the ILC project (Liakopoulos, 2020b).

Of course, the topic is complex and perplexing regarding *erga omnes* obligations given that the collective enforceability of some obligations has to do with general rules and the criminal responsibility of perpetrators of international crimes, thus guaranteeing legal protection that strengthens the values of the global international community.

The evolution of contemporary international law is oriented towards a strengthening of legal networks that protect such sensitive values as the protection of human rights, consolidating once again the principle of individual criminal responsibility for international crimes as well as the mandatory rules for international public order thus carrying out mandatory norms of general international law which are recognized by the Vienna Convention of the Law of the Treaties (VCLT) of 1969 as well as by recent developments in the work of the ILC during 2022 for

*erga omnes* obligations.

This is a category of *erga omnes* obligations that consolidate international courts and the practice of states. Especially in the moment of violence during a war, the concepts of international law for international security and legitimate defense are in contrast with a legal system that strengthens the protection and the fundamental values of the community, thus constituting an authoritative social base and its related legislation.

For the international community, all these appeals promoted by South Africa, Gambia, Canada, the Netherlands and Nicaragua are the results now founded on a mature legal ground where the politics of the past and the judicial dispute do not respect the past but find the basis of the past to press on and to move towards new instruments to safeguard substantial, procedural instruments invoking the international responsibility of states and individuals. The violation of the 1948 Genocide Convention as it was seen in Gambia v. Myanmar, South Africa v. Israel and Nicaragua v. Germany more against torture of the 1984, i.e. Canada and the Netherlands v. Syria, included the mandatory jurisdiction clauses

that are part of the convention, trying to linear judgments that also take into consideration prohibitions respecting the main notions of international law such as armed attack, aggression, involvement in the conduct of non-state actors, self-defense, humanitarian interventions, use of force, dispute resolution and an interpretation that often escapes the classic interpretation of international law and the VCLT (Hollis, 2020).

The ICJ dealt with the four cases relating to procedural legitimacy in March of 2024, calling the lack of protection of *erga omnes* obligations which are based on Art. 48 of the draft article of 2001 (Liakopoulos, 2020b).

In particular, in the Ukraine v. Russia case it was noticed the violation of ex art. 42. In Nicaragua v. Germany case it is noted that the defendant state is not responsible for the tort as a direct state. As a common argument in four cases we have the Genocide Convention and in the Nicaragua v. Germany case also the violations of the Geneva Conventions of 1949 and of its additional protocols of 1977, that is,

> "(...) norms of general international law in relation to the

Occupied Palestinian Territory, particularly the Gaza Strip (...)".

**Previous case law as a basis for further interpretation**

Disputes between states concerning the application, execution, interpretation of the Genocide Convention take into consideration the old jurisprudence of the ICJ. In the Mavrommatis case of 30 August 1924 it was stated that PCIJ:

> "(...) a dispute consists in a disagreement on a point of law or fact, a conflict of legal views or of interests (...) between parties and exists when the claims of a state (…)" (Kolb, 2013; Liakopoulos, 2020a).

In the South West Africa, Preliminary Objections case of 21 December 1962, it was stated that "positively opposed by another (28), even if not *expressis verbis*"[6].

In the Land and Maritime Boundary between Cameroon and Nigeria case, Preliminary Objections of 11 June 1998 noticed

6https://www.icj-cij.org/case/47/preliminary-objections. Accessed on 16.06.2025.

that "the silence may also speak"[7]. In the Pedra Branca v. Pulau Batu Puteh case of 23 May 2008, it was noted that:

> "(…) to respond to a claim in circumstances where a response is called for can demonstrate the existence of the dispute (…)"[8].

The same position it was noted in the Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Preliminary Objections, ruling 1 April 2011, para. 30[9].

Recently in the case under investigation and in the provisional measures of 12 January 2024, Israel based on some points of thought due to the absence of a dispute against South Africa. On the one hand, the conduct and declarations on the part of South Africa have contested the violation of the convention with a

7ICJ, Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening) of 29 March 1994, par. 89 https://www.icj-cij.org/case/94 . Accessed on 16.06.2025.

8ICJ, Sovereignty over Pedra Branca/ Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore) of 24 July 2003, par. 121: https://www.icj-cij.org/case/130 .Accessed on 16.06.2025.

9https://www.icj-cij.org/case/172 .Accessed on 16.06.2025.

unilateral character, integrating thus bilateral interactions that emerge from exchanges of meetings.

On the other hand, Israel declared the verbal note it received on 21 December 2023 as unacceptable, which South Africa ignored after the response it allowed to be given on 27 December. In response, Israel was officially available for a meeting despite the fact that after the appeal to the ICJ it did not give the opportunity to listen to meetings and/or to respond to the positions of the South Africa which immediately needed to obtain a response through an appeal from the ICJ ignoring with ridiculous excuses that it has not received responses from Israel thus casting doubt on the intentions to resolve issues before even referring to the ICJ.

The lack of timeliness of the exchange of notes from the ICJ found that the dispute did not comply with the verbal note of 21 December 2023 where it characterized military operations from Israel as reactions that include actions of the crime of genocide. Israel has rejected the accusations of genocide for various states and not only for South Africa.

The Hamas conflict has also been defined by the ICJ itself as "wholly unfounded, legally and factually incoherent valid basis, in fact or in law".[10]

The exchange of notes was enhanced by the ICJ in an indirect, informal way given that the accession on the side of South Africa in the General Assembly and the defense of Israel was created. The use of the expression "exchange" was characterized by the ICJ as "clearly opposite views" where the general spirit was that which was created through the order on provisional measures in Ukraine v. Russia of 16 March 2022 and the need for a substantial evaluation where in a formal and irrelevant way the protest of a diplomatic nature was valued as:

> "(…) statements and documents exchanged between the Parties (...) in multilateral settings (…) special attention (…) is intended or actual addressee and its content (…)".[11]

As for the statements from the General Assembly they were interpreted by the ICJ in the same way that we saw in Gambia v. Myanmar.

10ICJ, Order of 26 January 2024, p. 11, parr. 26-27.

11ICJ, Order of 26 January 2024, op. cit., par. 25.

Particularly, it has tried to interpret the non-acceptance of the existence of disputes between the Marshall Islands and the nuclear states including countries such as China, France, United Kingdom, Russia and the United States and of countries such as North Korea, India, Israel and Pakistan that were accused of serious violations based on Art. VI of the treaty of nuclear non-proliferation of 1968 and the customary rule that obliged nuclear states to negotiate based on good faith:

> "(…) relating to cessation of the nuclear arms race at an early date and to nuclear disarmament (…)" (Reinhold, 2013).[12]

In the Gambia v. Myanmar case the ICJ stated that:

> "(…) the declarations in the General Assembly of Gambia and Myanmar which, referring to the reports of the fact-finding mission established by the Human Rights Council, accepted or criticized the conclusion according to which it was reasonable to believe that a genocide was taking place against the Rohingya (…). Myanmar's claim to condition the existence of the dispute

12ICJ, Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom): https://www.icj-cij.org/case/160. Accessed on 16.06.2025.

> on mutual awareness and therefore on the need for the respondent to expressly oppose the claims of the applicant (...) remain silent in the face of the complaints would allow the dispute not to crystallize in defiance of the Court's consolidated position according to which, under certain conditions, the silence may also speak (…). Myanmar's silence on Gambia's verbal note contesting the violation of the Genocide Convention (unlike South Africa, after sending the note Gambia waited almost a month before filing the appeal) was even interpreted as an implicit and further rejection of the accusations already made by Gambia in the Assembly a few weeks earlier and therefore as yet another confirmation of the existence of clearly opposed views (…)[13] lacked sufficient particularity, in the sense that the Gambia did not specifically articulate its legal claims (…)".

The violation of the Convention had not been expressly invoked. The exchange of opposing views is assessed in relation to the subject-matter of a treaty and not to the express and specific mention of the same. It recalled the reports of the fact-finding

13ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) 22 July 2022, parr. 71 and 76, p. 505 and 507.

mission in which the references to the Genocide Convention, and its probable violation, were clear and expressed. In the Gambia disputes the Court found the requirement of sufficient particularity *de relato* or by referring to documents drawn up and produced by other subjects.[14]

From the previous jurisprudence of the ICJ and above all the dispute with the Marshall Islands which did not find a basis in the proceedings against India, Pakistan and the United Kingdom which in reality had the jurisdiction of the ICJ recognized based on the former Art. 36, par. 2 of the Statute of the ICJ (Kolb, 2013; Thirlway, 2016; Liakopoulos, 2020a) as well as those against other states that have not accepted jurisdiction have allowed Israel to try and obtain the same line in our case.

In the case of the Marshall Islands the preliminary objections which are obtained from three states as well as the non-existence of dispute which was accepted through rulings on 5 October 2016 allowed the ICJ to declare that:

14ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), op. cit., parr. 77-78.

> "(...) the declarations of the Marshall Islands in some multilateral contexts (…) High-level meeting of the General Assembly on nuclear disarmament and an Intergovernmental Conference did not refer to the subject-matter of the appeal with sufficient clarity and to make the recipients aware of the existence of a dispute and that, in any case, beyond a general criticism towards the nuclear states, the omitted specification of the allegedly illicit conduct did not impose on them a specific reaction from which the necessary opposition of views would have derived (…)".[15]

These are positions that are also formally evaluated by the judges themselves who are based on the relative rejection even of the Israelis to assimilate two cases given that the Marshall Islands were involved in the topic of the nuclear threat while for South Africa the related disputes against Israel were based on military works in the Gaza Strip thus contesting violations against the genocide.

It is also appreciated that the ICJ found the existence of a dispute

15Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), preliminary objections, parr. 49-50, pp. 853-854.

between South Africa and Israel as an expansive approach that respected the work of the ILC and the related project on the identification of customary international law of 2018 which had to do with verbal and/or material conduct that demonstrated the existence of a general practice of a right that has acquired the status of persistent objector.

The protection of the commission to attribute a relative precise weight to the relevant declarations as well as the relative silence of the assembly of an objecting state which thus claims a customary character (Liakopoulos, 2022) of a norm such as the Israeli one had a generic nature which oriented towards ascertaining the existence of a dispute between states.

**Towards a greater consolidation safeguarding fundamental rights**

Making and submitting an appeal to the ICJ, in a "quick" way, also means problems of procedural legitimacy. This is an *erga omnes* standing from a procedural point of view for the states party to the genocide convention.

The Israeli court did not go above and beyond the relevant complaint against the South African standing. The South Africa in its appeal and in the related order of 26 January referred to par. 33 of the same ordinance.

The procedural strategies and relative silence on the part of Israel was a response that required the relevant interpretation on the part of the ICJ without thus recognizing the procedural legitimacy of South Africa.

The related procedural legitimacy on the part of South Africa was based on Art. 48 and Art. 42 of the project of 2001 of the ILC that included for more than twenty years a progressive development of a codification that respected the states that had doubts of a legal nature as well as political fears for the

consequences that they could have on a collective level *erga omnes* obligations especially before a hearing of the ICJ.

Thus, we can hypothesize that even an injured state had a legitimate legal and qualified interest in taking legal action. The ICJ closing the relevant circle and beginning the opinion of reservations to the 1951 genocide convention, also opened the "amiable" discourse for the international community of international responsibility for serious violations and *erga omnes* obligations as well as for *jus cogens* norms that claim the protection of collective interests that are bearers of a precise nature.

The extensive interpretation of disputes as well as the judicial policy of the ICJ has directed international law in a path where the general assumptions of the international community are inorganic and entrusted towards a legal protection of fundamental values and towards dynamics that give life to law and justice to a contemporary international law of global inspiration.

The ICJ, through the Opinion of the 1951, which was also used in the appeals of Gambia, Ukraine and South Africa, affirmed:

> "(…) the foundations of the edifice which in recent years is rapidly being built in order to protect the fundamental values of International community (...) it is up to the states, not the Court, to create international law and above all the scope of *erga omnes* obligations, and in particular the judicial law enforceable by non-injured but qualified states pursuant to art. 48, is disliked by those states, even representative ones, who view with distrust and reluctance the forms of strengthened and community protection of the fundamental values of the Community, including the regime of aggravated liability for serious violations of the *jus cogens* provided for by Articles 40 and 41 of the Draft Articles of 2001, according to the United States (...) general international law (…)".[16]

As well as the US position, critically recalled by Palestine at the hearing on 19 February 2024:

> "(...) on the request for an advisory opinion (...) receptive to the requests of states which without fear invoke in court the "new" strengthened protections available of the contemporary community as, precisely, the *erga omnes* obligations. Definitive

16Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom, preliminary objections, op. cit.

> conclusions on the long-term development of international law on these aspects still seem premature but the regulatory and jurisprudential data is nevertheless significant and heralds possible, if not probable, significant developments in line with the long logical-argumentative path (…)".[17]

The opinion of 1951 as well as the related ruling of South West Africa of 1966 also marked the basis for the greater protection of fundamental rights not only in an international but also in a European context. According to the ICJ:

> "(…) a member of a community to take legal action in vindication of a public interest (…) an "*actio popularis*" (…) is not known to international law as it stands at present (…)".[18]

Of course, this is also a negative approach with regards to *erga omnes* obligations given that the position of the aspects that reject the memories of Ethiopia and Liberia which concerned the recognition of the ownership of rights that are connected with the

17ICJ, Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem: https://www.icj-cij.org/case/186.Accessed on 16.06.2025.

18ICJ, South West Africa Cases, Second Phase, sentence of 18 July 1966, par. 88: https://www.icj-cij.org/case/46 . Accessed on 16.06.2025.

mandates of the society of nations as well as the decision of the court for the subjective choices of legislative policy and the objective interpretations of the law where the denial of the right of the *actio popularis* affirms the development of an international law towards a difficult moment where the law always goes above and beyond to respect values and safeguard rights. Thus, in the same line of thought, the Peruvian president Bustamante y Rivero noted in the Barcelona Traction case that:

> "(...) the distinction between the obligations of a state towards the international community as a whole, and those arising vis-à-vis (…) concern of all states in view of the importance of the rights involved, all states can be held to have a legal interest in their protection (…)" (Liakopoulos, 2020a).[19]

**Jurisprudential protection in recent years**

The ICJ in Gambia v. Myanmar has sought to deny Gambia's procedural legitimacy from an active perspective. Asking only from one side, according to ex art. 48, the international

19ICJ, Barcelona Traction, Light and Power Company, Limited, sentence of 5 February 1970, p. 32, par. 33.

responsibility of another, the substantive question and the legal interest were different from the procedural legal standing. As far as Myanmar was concerned, the right to ask for the responsibility of others and to also include the right to appeal to the ICJ despite the fact that the standing was based on the statute and the jurisprudence of the ICJ forced Gambia to admit the procedural legitimacy, according to art. 48, to apply in a subsidiary manner and respecting art. 42, the obligation of standing which made a third state necessary and legitimate which cannot be the state pursuant to art. 48 for the protection of collective interest.

In the case of Rokingya genocide in Myanmar an aggrieved state is specially affected according to the violation of art. 42 (b) (i). Bangladesh welcomed the relevant territory and the displaced people who were fleeing the violence. Thus, Bangladesh requested as a legitimized state to ask for the violation of the prohibition of genocide before the ICJ and the reservation of Art. IV of the convention where the jurisdiction is not according to Myanmar for other states entitled to be sued.

The subsidiarity of judicial actions by states, according to ex art.

48 which respect the states and ex art. 42 which denies the South African standing, are not recognized by the court especially in the order relating to the provisional measures of January 2020 as well as in the related ruling concerning the preliminary objections of July 2022 despite the dissenting opinion of the Chinese judge Xue (Graf, 2024).

In particular, the judge stated that the provisional measures in Canada and the Netherlands v. Syria as well as in the South Africa v. Israel case, taking the preparatory work of the convention as a starting point, did not demonstrate that procedural legitimacy had to do with non-aggrieved states (Clancy, 2024).

The ICJ regarding the standing of Gambia despite it not being a specially affected state of the convention stated that:

> "(…) an interest in compliance with them in any given case (…) any state party to the Genocide Convention, and not only a specially affected state, may invoke the responsibility of another state party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes* and to bring that

> failure to an end (…) any state party, without distinction, is entitled to invoke the responsibility of another state party (…) including the institution of proceedings (…)".[20]

Thus, an objection position on the part of Israel did not allow to the subsequent stages of the proceedings the relevant conclusions of an alleged Israeli violation of the genocide convention. The case in South African seems to be very difficult to arrive at a certain, precise violation of the Genocide Convention. The same holds for the South Africa v. Israel case who clarified the standing before the ICJ according to art. 48 for serious violations and *erga omnes* obligations. In other words, such a case remains under discussion perhaps it has never reached a concrete declaratory statement on the part of the ICJ.

**Towards protective measures**

The main point for the appeal was the fact that the ICJ asked Israel to take provisional and reasonable measures to prevent the genocide.

20ICJ, Gambia v. Myanmar, Order of provisional measures of 23 January 2020, op. cit., par. 41.

Measures requested by the South African side which guaranteed that the convention and the related procedure prevented the destruction of evidence. The measures arranged in order not to aggravate the relevant dispute.

The ICJ thus discreetly exercised the measures that must be different and requested by the appellant state. Measures not ordered by the ICJ thus attracting mainly political attention which included the suspension of military operations against Gaza to protect the Palestinians from irreparable risks and prejudices according to their rights enshrined in the Genocide Convention.

The same line of thought was also held in the case of the Ukraine with an irregular, direct way that supported individuals to organize and control Russia. The Ukrainian request had a different logic from that of the South African and Ukraine.

The latter did not accuse that Russia was committing genocide by manipulating and violating Art. I of the convention to falsely accuse the Russian and Russian-speaking population from Donbas. Suspending hostilities does not mean stopping the

genocide from a military operation that justified a false basis of genocide based on manipulation of the convention of 1948.

The Russian conduct was classified as harmful according to the convention that had in itself a genocidal character (Milanovic, 2024).

In this spirit, the provisional measures did not overcome the preliminary objections and the ruling of 2 February 2024 actually accepted what the Russians said for the false accusations of genocide and the use of force which did not fall within the scope of the convention. The ICJ found that Ukraine did not commit genocide. In its eastern “oblasts” it disavowed the continued and subsequent use of force against Ukraine.

The order of 26 January 2024 of the ICJ did not request the immediate suspension of the relevant hostilities despite the fact that the non-compliance by the South African side was not explicit and motivated by the ICJ. It did not highlight that all the provisional requests guaranteed the protection of the Palestinians for an alleged genocide. Also the suspension of military operations did not in themselves protect the rights of the

Palestinians.

The violations of international humanitarian law and the violation of the Genocide Convention respected the scope of the provisional measures it protected.

The rights of the Palestinians, according to the ICJ, were concentrated on:

> "(…) a) Israel adopting all the measures in its power to prevent the commission of the genocidal acts prohibited by art. II, letter. a-e, of the Convention (killing of members of the group; serious injury to the physical or mental integrity of members of the group; deliberately subjecting the group to living conditions intended to bring about its physical destruction, in whole or in part; measures aimed at preventing births within the group; forced transfer of children from one group to another); b) in ensuring Israel with immediate effect compliance with art. II, letter. a-e, also by the IDF; c) in Israel adopting effective and immediate measures to guarantee basic services and humanitarian assistance "to address the adverse conditions of life faced by Palestinians in the Gaza Strip (…)".[21]

Measures a) and b) were adopted unanimously. Furthermore,

21https://www.icj-cij.org/node/203447. Accessed on 16.06.2025.

measure a) was the same as that adopted unanimously in the Gambia v. Myanmar case where in the ordinance of the 23 January 2020 it also distinguished and respected the extension of the obligation:

> "(…) irregular armed units which may be directed or supported by [Myanmar] and any organizations and persons which may be subject to its control, direction or influence (…)".[22]

The measures confirmed that first of all we have a still expanding armed conflict where even serious violations of international humanitarian law are committed which do not automatically lead to the existence of a genocide. For Myanmar, which was not participating in an armed conflict, the logic of the ICJ was that the measure could have a functional character to protect the Palestinians as well as the risk of genocide to respect the relevant convention through hostilities of arriving at a termination without resolution of the conflict.

The measures in South Africa v. Israel and in Gambia v. Myanmar cases are balanced and suitable according to the

22ICJ, Gambia v. Myanmar, Order of provisional measures, op. cit., par. 86.

jurisdiction of the ICJ. The objective of protecting the Palestinians and the Rohingya from genocide (O'Brien, Hoffstaedter, 2020; Liakopoulos, 2021) and not from an armed conflict and security operations per se are positions that contribute to the path of ordering the suspension of the relevant hostilities. If this were the case, the relevant measure could have forced Israel to create greater confusion. In the Ukraine v. Russia case the ICJ ordered the suspension of human rights violations (Loger, 2022).

Suspending hostilities as a mandatory measure on the part of the ICJ has introduced an open debate with the Security Council. The relative silence of the court could, from a political point of view, put the Council in the phase of assuming its responsibilities and ordering the ceasefire.

The order of 26 January put the basis for a new agreement regarding the ceasefire between the states. For the United States this approach was characterised as premature. France was also in the same line of thought.

Predicting and stopping a fire through a resolution and after a

long discussion from the Security Council is one of the reasons that determines above all for the United States to vote against, thus arriving at a vote that we have seen in the recent past and especially on 20 February 2024 with the Resolution 2720 of December 2023 which asked:

> "(…) sustainable cessation of hostilities (…) to create the conditions for a sustainable cessation of hostilities (…)".[23]

**Article II, I par. c) of the Genocide Convention**

It was difficult to accuse Israel of military operations that were based on acts of the crime of genocide and for the related commission of material acts that are included in the convention that respected the existence and in a specific way:

> "(…) the destroy, in whole or in part, of a national, ethnic, racial or religious group (...) on the state offense and of the international criminal courts on the individual crime, as necessary to consider the acts of art. II, letter. a-e, with no reference at all to the intent criterion, thus denuding the crime of

23 https://www.un.org/unispal/document/security-council-resolution-s-res-2720-22dec2023. Accessed on 16.06.2025.

> its very essence: Hamlet without the Prince; a car without an engine (…)".[24]

Acts of the crime of genocide on the part of Israel were difficult to prove. South Africa, on the other hand, continued the path of statements that had a political and less legal character.[25] Thus at the hearing of 12 January 2024 it was highlighted that:

> "(...) the declared intent to militarily eradicate Hamas has nothing to do with the alleged intent to also destroy the Palestinians of Gaza and, on the other hand, that the declarations reported by South Africa must be attributed to bodies (in the broad sense that the term assumes in the area of international responsibility) (...) decide and implement operations against Hamas in Gaza without any genocidal intent as their declarations, policies and documents would demonstrate (...) Israel recalled both the daily operational directives from which

24ICJ, Public sitting, Verbatim record, intervention of Israel, 12 January 2024, p. 30, par. 32: https://www.icj-cij.org/case/192/oral-proceedings. Accessed on 16.06.2025.

25ICJ, Application instituting proceedings and request for the indication of provisional measures, pp. 59-67, parr. 101-107: https://www.icj-cij.org/node/203394. Accessed on 16.06.2025.

emerges the obligation to promptly and rigorously respect international humanitarian law and some statements by the Prime Minister and the Minister of Defense which demonstrate the consistent and relentless commitment of Israeli relevant authorities to mitigate civilian harm and alleviate civilian suffering in Gaza (…) the declarations referred to by South Africa would therefore not be relevant to demonstrate that Israeli policy and military action are characterized by a specific genocidal intent (…) Israel has underlined how the Minister of Heritage, author of statements that are suspicious to say the least in light of the Convention, is completely outside the policy-and decision-making processes in the war [and as] in any event, his statement was immediately repudiated by members of the War Cabinet and other ministers, including the Prime Minister (…)[26] spare no one, but kill men and women, infants and sucklings, oxen and sheep, camels and asses (…),[27] -the Israeli defense could be effective if the Court accepted the proposed distinction between the clearly rhetorical nature of declarations made in the

26ICJ, Public sitting, Verbatim record, intervention of Israel, 12 January 2024, p. 34, par. 48.

27ICJ, Application instituting proceedings and request for the indication of provisional measures, op. cit., par. 101, p.60.

> heat of the moment after 7 October and the real political-juridical capacity to demonstrate an actual genocidal intent (…)".[28]

The relevant provisional measures were based on the plausibility and accusation of South African genocide in relation to the destruction of Gazza. The lives of the Palestinians where Israeli political and military statements as well as evidentiary standards were high addressed on the border of genocidal intent for the ICJ. Israel was confident to recognize the violation of Art. II of the convention and asked for:

> "(...) concrete measures aimed specifically at recognizing and ensuring the right of the Palestinian civilians in Gaza to exist and has facilitated the provision of humanitarian assistance throughout the Gaza Strip (…)".[29]

The ICJ took a different tack regarding the violation of Art. III, letter. c) of the Convention of 1948 given that:

> "(...) states parties to prevent and punish direct and public

28ICJ, Public sitting, Verbatim record, intervention of Israel, 12 January 2024, parr. 49-50, pp. 34-35.

29ICJ, Public sitting, Verbatim record, intervention of Israel, op. cit.

> incitement to commit genocide also in relation to Articles IV (...) V (obligation to implement the Convention in domestic law, providing for effective sanctions for those who violate articles II and III) and VI (obligation to try those responsible before national courts) (...) purposes of articles. II, letter. a-e, and III, lett. a, of the Convention, the declarations of ministers, politicians and members of Israeli society could integrate the case of direct and public incitement to commit genocide which Israel is obliged to prevent and punish as also reiterated by the third provisional measure of the Court which requires adopting all measures to prevent and punish the direct and public incitement to commit genocide (…)".[30]

Before the hearings in January 2024 to the ICJ the Attorney General, Gali Baharay-Miara together with the State's Attorney, Amit Eisman announced the start of the related investigations:

> "(…) the state of Israel, including the security agencies, are obligated to act according to the principles of international law and the laws of war. Statements that can be read (…) as calling for the international harm of uninvolved citizens, are against the prevailing policy and may constitute criminal offenses,

3030ICJ, Public sitting, Verbatim record, intervention of Israel, op. cit.

including incitement offenses (…)".[31]

Such type of statements have had as a point of awareness that the appeal of South Africa as well as the order of the ICJ have benefited from an international judicial dispute. In the relevant order of 26 January 2024 the ICJ underlined that:

> "(...) Israel recently stated that a call for intentional harm to civilians may amount to a criminal offence, including that of incitement, and that several such cases are being examined by Israeli law enforcement authorities (…) fulfill the provisional measure and the obligation art. III, letter. c, of the Convention. Israeli measures must specifically concern incitement to genocide and not to ignoring or violating international humanitarian law (…)".[32]

Of course, the political balance at the national level was very imprecise and it could not allow Netanyahu to change course and/or prevent incitements that contributed to the ICJ's recognition of the violation of Art. III, letter. c) of the Genocide

31https://www.haaretz.com/israel-news/2024-01-09/ty-article-live/blinken-to-meet-israeli-leaders-hezbollah-confirms-death-of-senior-commander-in-lebanon/0000018c-ec30-df6f-ad8e-ec77ad540000. Accessed on 16.06.2025.

32ICJ, Public sitting, Verbatim record, intervention of Israel, op. cit.

Convention of 1948.

**Report's content**

The provisional measures that are made by the ICJ and presented by Israel on 26 February 2024 were based on not being leaked on social media, thus requiring the two countries to maintain confidentiality and implementing it in an indirect way.

For Israel the report and implementation were pleonastic. Since the beginning of hostilities, Israel has conducted hostilities in compliance with international humanitarian law as well as the impossibility of committing acts and crimes of genocide. The South African appeal was considered by Israel to remain off the air, from a political point of view, given that the military operations in the Gaza Strip have affected:

> "(…) personnel or objectives in accordance with international humanitarian law in a proportionate manner in each case, as well as its practice of mitigating civilian harm such as by forewarning civilians of impending action by the unprecedented and extensive use of telephone calls, leafleting and so forth

> coupled with the facilitation of humanitarian assistance, all demonstrate the precise opposite of any possible genocidal intent (…)".[33]

For Israel, the IDF personnel through the military commands could allow the violation of acts of genocide as well as other violations of humanitarian law by opening avenues of investigation. Violations that taking into account information, statements, etc. where certain principles of international humanitarian law distinguished acts of genocide from military operations in a proportional manner. On the other hand, Hamas argued that:

> "(...) embedded among non-combatants in Gaza and has deliberately built its terror infrastructure in civilian area across the enclave (...) does not in any case exempt the IDF from the obligation to respect international humanitarian law in its entirety (...) the need to respect it in the fear, or perhaps in the awareness, that such violations occur in Gaza and without prejudice to the fact that in themselves they do not also demonstrate a genocidal intent (...) the requests and complaints,

33Public sitting, Verbatim record, intervention of Israel, 12 January 2024, par. 37, p.31.

> more or less explicit, of Israel's closest allies always and only refer to the commission of violations, even serious ones, of international humanitarian law and never to the genocidal character of such acts (...)" (Hagari, 2024).

Israel has always denied claiming the right to avoid and adopt controls and security measures that reach the Hamas military apparatus. Of course, Israel has always denied that it committed acts of genocide, even the intention to commit acts of genocide by causing physical destruction, thus claims a decisive role in protecting humanitarian assistance.

The prevention of acts of genocide according to Art. II, letter. a-e of the Convention ensured that the IDF would give humanitarian aid to the Palestinians, including those of a functional nature for the genocidal war, and at the same time continue its "work in the Strip" even after the ordinance. So the order only had a political and less legal character.

The content of the report concerned Israel's measures that imposed the relative prevention and direct action against the genocide, being able to give meaning to the investigations which

resulted in ongoing trials and sentences that have already been issued.

**ICJ' s order, military and political objectives**

According to the report of the previous paragraph the relevant proceedings before the ICJ especially regarding the subjective element of the precise intention as well as the existence of the crime of genocide implemented the provisional measures and evaluated the basis of objective parameters with the aim of ascertaining whether the order of the 26 January including data, statements, information from eyewitnesses from the side of Israel has demonstrated that they comply with the measures within a framework of political-military planning of operations in the Gaza Strip.

Moreover, the increase in humanitarian flows show that the violation suitable for managing one's real risk is an irreparable damage to the rights of Palestinians as well as violations of the acts II and III of the Genocide Convention.

The military, political planning and conduct of the IDF are not

simultaneously part of the substantial changes where the frequency and intensity of operations achieve military objectives and previously according to the needs to protect the provisional measures.

By destroying Hamas and evacuating the population, the frequency and continuous flow of operations thus increases, the number of civilian victims. Reducing war violence in civilian areas also means decreasing the likelihood of carrying out genocidal acts as provisional measures that necessarily require compliance with the Genocide Convention.

The operations in Rafah were a battlehorse for South Africa. They are viewed as a phase of a genocidal plan that interpreted the violations as violations of international humanitarian law. Thus South Africa before the ICJ on 12 February 2024 declared that:

> "(…) may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties (…) without any hearing or

submission by parties (…) art. 75, par. 1, refers to *proprio motu* measures of the Court while art. 76, par. 1, which applies to those requested by a party and substantial (a party may request additional measures if, in its opinion, some change in the situation justifies such (…) modification (…) change in the situation would have occurred in Rafah and, in any case, the order of 26 January, valid for the entire Strip, already applies to Rafah),[34] the Court then communicated its decision on 16 February noting, on the one hand, that (...) the most recent developments in the Gaza Strip, and in Rafah in particular, would exponentially increase what is already a humanitarian nightmare with untold regional consequences, as stated by the United Nations Secretary-General (Remarks to the General Assembly on priorities for 2024, 7 Feb 2024) (…) the immediate and effective implementation of the measures provided for by the ordinance of 26 January is already sufficient without the need for other measures (…)".[35]

34Urgent Request for Additional Measures under Article 75(1) of the Rules of Court of the International Court of Justice, 12 February 2024.

35Decision of the Court on South Africa's request for additional provisional measures, Press release No. 2024/16, 16 February 2024, p. 1: https://www.icj-cij.org/node/203559. Accessed on 16.06.2025.

**Humanitarian flows**

Humanitarian aid, it is continuously decreasing as we know from statements by the General Commissioner of UNRWA (UN Agency for Palestinian Refugees in the Near East), where in February 2024 informed us of a decrease of 50% compared to the previous month based on:

> "(…) political will, regular closing of the crossing points and lack of security due to military operations (…)".

Amnesty International had already stated the relative decrease in the transport of aid entering the Strip (Amnesty International, 2024). As also the Special Advisor of the Norwegian Refugee Council and the AIDA-(Association of International Development Agencies), in February 2024 reported that:

> "(...) the entries fluctuated between 4-7 (17 and 9 February) and 130 -199 (14 and 16 February) for a daily average of 90 trucks, far lower than the necessary flow, estimated between 500 and 600 entries, which was guaranteed before 7 October (…) Protection of civilians in armed conflict on the Council's agenda of security since 1999, on 27 February 2024 a meeting was held

> on food insecurity which, for the first time, concerned the conflict in Gaza (...)".

At the meeting, the World Food Program and the UN Office for the Coordination of Humanitarian Affairs (UNOCHA) informed of the situation and above all the obstacles affecting the flow of aid to continue the precise risk of famine for a medium period of time. Continuing with COGAT (Coordinator of Government Activities in the Territories), a unit of the Israeli Ministry of Defense stated that:

> "(…) over 13,000 trucks carrying over 250,000 tons of humanitarian aid entered the Gaza Strip since the start of the war. There is no limit to the amount of humanitarian aid that can enter Gaza (…) provides different data on entries (e.g., on 25 February almost 500 aid trucks entered the Strip), reiterates that the humanitarian situation is not that serious as told by humanitarian workers and attributes the difficulty in distributing aid, as well as to Hamas, to the inadequate and fallacious handling capabilities of the UN and other aid agencies within the Gaza Strip (…)" (Wintour, 2024).

The war and security work was not suspended and the

obligations of humanitarian assistance as well as the requirement of the Hamas in the Israeli strip did not legitimize the deprivations for the population where the destruction of the relevant aid which did not depend on the will of Israel was also noted given that the order of the 26 January obliged Israel to do what it could and above all:

> "(...) address the adverse conditions of life faced by Palestinians in the Gaza Strip (...) and the relative evaluation must therefore be carried out not in absolute terms, that is, if the humanitarian emergency is over, but relative, that is, if the Israeli measures have at least mitigated it (…). Of the divergences between Israel and humanitarian operators on the exact data, the decrease in aid after January 26th is objectively verifiable and the implementation of the ordinance on this point is at least unsatisfactory or inadequate, regardless of whether all this also conceals a genocidal intent or constitutes "only" a violation of international humanitarian law (…)".[36]

The prevention and punishment of incitement to the crime of genocide as well as investigations for the Israeli authorities are

36Decision of the Court on South Africa's request for additional provisional measures, Press release No. 2024/16, op. cit.

not processes where those responsible have not suffered the relevant consequences. The needs and balances of Israeli domestic politics are irrelevant in the evaluation of international obligations. The ordinance of the convention took into account the provisional measures in an inadequate manner.

Within this framework, the relevant conference was created by the Otzma Yehudit of Minister Itamar Ben-Gvir in Jerusalem approximately three days after the adoption of the ordinance. It was also attended by ministers of the Netanyahu government and above all BenGvir who declared in this regard:

> "(...) moral and humane to remove the Palestinians from the Strip and then annex it, certainly do not facilitate the defense of Israel before the Court (...)" (Amnesty International, 2024).

**The weaknesses of the positions concerning Israel's side**

The non-continuation of the non-suspension of the ceasefire by the ICJ as requested by South Africa demonstrates that the provisional measures with the order of 26 January were aimed at risk management operations which seemed to be irreparable for

the rights of the Palestinians who they were protected by the Genocide Convention as well as guaranteed living conditions that did not cause physical, partial, or total destruction through a continuous and adequate flow of humanitarian aid. The obligation to punish increased the genocidal spirit, that is, revenge and hatred, manifesting the related consequences.

In particular, the Israeli report of 26 February as well as the political character and the humanitarian aid and inflammatory statements in the adoption of the ordinance have reasonably induced Israel's political, military and humanitarian changes and conduct.

Israel persecuted the genocide of the Palestinians in the Gaza area through a border of conduct of an intent criminal act of genocide that violated international humanitarian law remaining subtle to an assessment where it required that the difficulties of proving such acts was a reality not demonstrable in all cases.

The material and verbal conduct thus offers the ICJ a decisive way of establishing the intention of genocide where the ICJ did not implicitly consider such a conduct. The Israeli defense of the

accusations of genocide, which are based on Art. II, letter. A-b of the convention, have the strength to follow political orders trying to eradicate the military presence of Hamas and respecting international humanitarian law.

Implicit acts of genocide are also considered as possibilities for serious violations of international humanitarian law of a genocidal nature. Offending the land of Rafah and committing violations does not change the logic of the international community that war crimes violations are ongoing and perhaps genocide less so and/or perhaps hidden and covered under other acts in the area.

The political leadership has decided on the objectives and methods of the war where the inflammatory statements implicitly show the weakness and compliance with the obligations deriving from Art. III, letter. c) of the convention for the prevention, punishment and direct incitement of genocide.

The statements did not get the relevant points. For Israel the initiation of investigations after 7 October 2023 was a prevention and punishment of these soldiers and politicians who ignored the

order of things and art. III, letter. c).

Another point from Israel's position that concerned the ICJ to anticipate the complexities and uncertainties was the genocidal intention as a weak point that diminished humanitarian aid when it comes to consider the consequence of a will that put the Palestinians in living conditions who intended to cause a total and partial destruction of another people where in a rigid and illegitimate manner international humanitarian law as well as security measures are in conflict with the military apparatus of Hamas.

The population has had problems finding food and the political strategies seem to be unsuccessful and certainly a violation of international humanitarian law.

**Conclusions**

Violations of humanitarian law and crimes of genocide before the ICJ are on a partial path because what matters most was the ceasefire. If Israel becomes the actor of international responsibility for the failure to prevent and punish genocidal acts like this, it would be a victory for South Africa before the ICJ.

The development and consolidation of international law, through resolutions of disputes for better or for worse, go through an evolutionary phase and consider the application of new uses to an armed terrain such as for example new generation weapons and drones, creating phenomena where forms of protection strengthen the fundamental values of the international arena.

Within this context, *erga omnes* obligations, *jus cogens* norms, international crimes are concepts that keep in close company with legitimate defense and international security.

The ICJ, through demonstrable respect for the ILC, remained at the center of continuous dynamics and related limits which are oriented towards an evolution of a system that activates war violence and international relations in a continuous and

uncontrollable manner many times where, as the ICJ itself also affirms:

> "(…) solution in the future, in conformity with international law (…) most significant, uniquely significant role, for protagonists and for the international community as a whole (...) only assist in a solution based on the law, by setting out the parameters required by the law to resolve the matter (…)".[37]

Between 19 and 26 February 2024 before the ICJ it was noticed the presence of around 50 states participating and of international organizations trying to make clarifications of a legal and less political nature. From a political point of view, the relevant participation in the political nature of putting Israel and Palestine before proceedings involving the strengthening of international law contributes to a precise interpretative application where numerous states take on the role of witness on an international scene making the presence even more important of the appeal of

37ICJ, Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, request for an advisory opinion of the General Assembly, Public sitting, Verbatim record, intervention of Palestine, 19 February 2024, par. 30, p.97.

1st March 2024 where Nicaragua against Germany, independent of the legitimate foundation will also have the weight of the tragedies that continue and live in Palestine, Gaza, the Rohingya, acts of genocide difficult to be affirmed and proven.

It always remains the problem, from a procedural point of view, that the tragedies will be continuous. If the contemporary international law does not always find a solution, if the fire does not cease, if the violations do not stop is not enough to become better the outcome of the proceedings, certain for the foreseeable future from all points of view and for continuous investigation.

In the present investigation, it is difficult to prove the case of genocide and all that it includes as a crime. What is immediately requested is the ICJ to establish in a precise and stringent manner the verification of the elements that include the crime of genocide.

Every time provisional measures are requested does not mean that a cycle of blood and/or a war situation is closed. The provisional measures aim to comply with international obligations but also to promote the attention of the international

community for serious crimes which can be qualified in stringent terms and also established by various conventions and by the ICJ itself. It is hoped that the measures will have to be effective, expressly demonstrating the international community's support for a difficult situation that needs to be controlled and supervised to avoid further worsening of the situation without excluding its own intervention even *proprio motu*.

International law is the *par excellence* instrument, a precise paradigm of international justice that responds to all the escalation of the crimes and in difficult situations that states of the international community as well as members of the UN find themselves in. The reflections that the majority certainly hold are political and less juridical and have consequences that do not accept compromises.

What we need is the choices of international law to try towards greater humanity in the areas of the planet that truly suffer not only from war but also from lack of food, respecting procedural principles that show that the strongest does not always win (Minear, 2016).

Global international law is here to carefully and rigorously reflect the rules of continuous competition between states and peoples where illicit acts are now, after all these years, a reality that create consequences and cannot go unpunished (Goldman, 2016).

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